EXHIBIT I

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**Defense Motion to Suppress All Out-of-Court Statements by the Accused made while in U.S. Custody** September 18, 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Judge's ruling on D-017 of 28 August 2008 establishing a deadline of 1200 hours on 18 September 2008 for filing of defense motions to suppress statements of the accused. The defense requested an order from the commission under MCRE 304(d)(3) allowing the defense to make a general motion to suppress as the defense has been unable to interview those persons involved in the taking of statements or otherwise to obtain information necessary to specify a grounds for a more specific motion to suppress. As no answer has been received, the defense has endeavored to be as specific as possible, given the constraints of the discovery and access to witnesses that has been provided to date.

2. Relief Requested:

(1) Mr. Jawad seeks the following relief:

(a) an order suppressing all self-incriminating statements allegedly made on or after 17 December 2002 to U.S. personnel, while in U.S. custody at FOB 195, Bagram, and Guantanamo, which the prosecution has indicated an intent to introduce into evidence; or, if the military commission finds that insufficient evidence has been presented at the suppression hearing on September 25 and 26, 2008 to warrant suppression of any or all statements:

(b) An order continuing the suppression hearing, and authorizing the defense to supplement this suppression motion, and,

(c) An order compelling the government to provide the names and addresses of all interrogators, observers and interpreters of all statements which the prosecution intends to introduce, as well as all notes of any interrogators and observers and any recordings of any such statements (or a sworn affidavit from a responsible detention official that no such recording took place); and,

(d) An order authorizing the defense to conduct a visual inspection of all facilities where interrogations took place; and

(e) An order appointing a criminal investigator with experience in Afghanistan to the defense; and

(f) An order appointing independent medical and psychological experts to the

defense, as requested in the separate motion to compel the appointment of experts.

(g) An order to declassify, or offer a suitable unclassified substitute of all statements the prosecution intends to introduce in evidence, so that the defense may discuss the facts and circumstances surrounding the making of the statement with our client.

3. Burden of Proof: Because this motion challenges the admissibility of Mr. Jawad's statements on the basis that they were obtained by use of torture and coercion and in violation of the 5th Amendment of the U.S. Constitution, the prosecution bears the burden of establishing the admissibility of these statements by a preponderance of the evidence. R.M.C. 304(e).

4. Summary of Facts:

a. On 17 December 2002 Mohammad Jawad was arrested in Kabul, Afghanistan by Afghan police and transported by Afghan police to the [redacted] Police Station in Kabul in conjunction with a hand grenade attack on an American military vehicle which injured two U.S. Special Forces soldiers and their Afghan interpreter. The arrest occurred at approximately 1530 on 17 December 2002.

b. At the time of his arrest, Mr. Jawad was a minor under the age of 18.

c. No evidence has been produced to indicate that Afghan police made any attempt to contact the parents of Mr. Jawad, an individual they clearly identified as a juvenile, or any social service agencies within the Afghan government responsible for the well-being of juveniles.

d. Mr. Jawad was subjected to intimidating and abusive treatment, both mentally and physically, while in the custody of the Afghan authorities.[1]

e. Afghan authorities did not offer Mr. Jawad anything to eat or drink during the approximately 6.5 hours that he was in their custody. During the course of several hours of interrogation by Afghan police and security officials, including the Interior Minister of Afghanistan and National Director of Security,2 Mohammad Jawad allegedly made incriminating statements and a document, purporting to be a confession, was prepared for him.[3]

f. Consistent with statements from Mohammad Jawad that he had been forcibly drugged, Afghan authorities observed Mr. Jawad to be under the influence or suffering from withdrawal of an unidentified psychotropic drug while he was in their custody.

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[1] As detailed more fully in the motion to suppress the statements allegedly made to the Afghan police. Expert assistance from a forensic physician and a clinical psychologist is necessary in order for the defense to completely evaluate this issue.

[2] According to the government witness list, at least five officials participated in the interrogation.

[3] The statements, oral and written, allegedly made by Mohammad Jawad while in Afghan custody are the subject of a separate motion to suppress.

g. U.S. Forces immediately requested that the perpetrator(s) of the attack be turned over to the U.S. for questioning. U.S. Forces were informed that Mr. Jawad was the person solely responsible for the grenade attack and that he had provided a full oral and written confession to the attack.[4] Mr. Jawad was transferred to U.S. custody at approximately 2200 on 17 December 2002.

h. Upon being turned over to U.S. custody, Mr. Jawad was taken to Forward Operating Base (FOB) 195, the Kabul Military Training Center (KMTC), for further interrogation and remained there overnight.

i. U.S. Forces personnel observed Mr. Jawad to be suffering from drug withdrawal upon his arrival to the FOB.

j. Mr. Jawad was subjected to inhumane and degrading treatment by U.S. personnel at FOB 195 upon his arrival there, in violation of Geneva Convention Common Article 3. He was ordered to remove all clothing, strip-searched, and directed to pose for nude photographs in front of several witnesses. (Attachment 1)[5]

k. At the time Mohammad Jawad was taken into custody, the medical condition of the U.S. soldiers injured in the attack was believed to be quite serious, possibly life-threatening. The other members of the injured soldiers' unit at FOB 195 were extremely upset and angry as a result of the attack. US Forces recognized that Mohammad Jawad appeared to be a juvenile. Because of concern over possible mistreatment of Mohammad Jawad and due to his obvious youth, a Chaplain was assigned to act as a "human rights observer" for Mr. Jawad. The Chaplain viewed Mohammad Jawad at that point as an "assassin" and felt a personal desire for vengeance against him, but nevertheless agreed to perform the duty as ordered. The Chaplain failed to prevent the humiliating and degrading nude photography. No evidence has been produced to indicate that the Human Rights Observer or anyone else made any attempt to contact the parents, friend or a relative of Mr. Jawad, or a social worker, social service agency, or NGO with expertise in the care of juveniles.

l. While in custody of U.S. Forces at FOB 195 Mr. Jawad was interrogated by U.S. agents for several hours. He was not informed at any time that he had the right to remain silent, that he had the right to consult with counsel or have counsel present, or that any statements he made would potentially be used against him in criminal proceedings. He was not given the opportunity to make a phone call or contact his parents or a guardian. He initially denied throwing the hand grenade, but allegedly confessed after several hours of interrogation.

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[4] It is not known if the handwritten statement prepared for Mohammad Jawad was provided to U.S. Authorities concurrently with the transfer of custody. No chain of custody documentation has been provided relative to this statement.

[5] These photographs are being submitted through secure means. The photographs are unmarked and their classification level is unknown. However, the photos were provided to the defense on a CD marked Secret

m. During the time in Afghan custody and at the FOB, (from approximately 1530 on 17 December until an unknown time on 18 December) Mr. Jawad did not eat or drink anything. After Mr. Jawad indicated that he was hungry and had not eaten in many hours, Mr. Jawad was finally given an MRE and water at approximately 0300 or 0400 on 18 December 2002. The interrogation at the FOB lasted several hours well into the morning before Mr. Jawad was allowed a short sleep. Mr. Jawad was observed to be very afraid and very tired by interrogators. According to the witness list provided by the prosecution, at least 6 persons were present during all or some of the interrogation

n. On 18 December 2002, after US Forces at FOB 195 completed the interrogation of Mr. Jawad, he was transported to the prison at Bagram, known as the Bagram Collection Point (BCP). No evidence has been provided to indicate who directed the transportation of Mr. Jawad to the BCP or the means of transportation, or the conditions which Mr. Jawad was subjected to during transport (e.g. hooding, shackling).

o. While in the custody of U.S. Forces at BCP for approximately 49 days, Mr. Jawad was subjected to severe abuse, maltreatment, and torture including isolation, beatings, hooding, being pushed down stairs and being chained to the wall. The conditions of confinement and the nature of the interrogations were inherently coercive.[6]

p. Mr. Jawad was subjected to at least eleven interrogations at the BCP. The prosecution has indicated an intent to offer classified summary interrogation reports from several of these interrogation sessions. According to reports purporting to summarize these interrogations, Mr. Jawad denied throwing the hand grenade during several interrogation sessions.

q. Mr. Jawad was held in custody at the BCP until on or about February 6, 2003 when he was transported to Guantanamo. No evidence has been provided documenting the decision, justification or authorization of U.S. authorities to transport Mr. Jawad from Bagram to Guantanamo.

r. Prior to transportation to GTMO, on information and belief, Mr. Jawad was intentionally starved for 3 days, given only sips of water, as was standard operating procedure at the time to ensure detainees would not soil themselves while in transit during the 17 hour flight.

s. Upon arrival to the prison at Guantanamo, Mr. Jawad was subjected to 30 days of isolation. During this period his only significant human contact was with interrogators. (See D-008, Supplement 5)

t. The conditions of confinement to Guantanamo to which Mr. Jawad was subjected from his arrival until June 2006 were inhumane and highly coercive, particularly to a juvenile

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[6] See NY Times articles by Tim Golden summarizing conditions at Bagram during the relevant time period. Tim Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," New York Times, May 20, 2005. (Attachment 2)

detainee. [7] Conditions were particularly bad during the first months of Mr. Jawad's captivity. The U.S. did not recognize that the Geneva Conventions applied to detainees at Guantanamo, and in fact specifically determined that they did not apply, until the Supreme Court held that they did apply in Hamdan v. Rumsfeld. In recognition of this ruling, DepSecDef Gordon England issued a Memorandum ordering that the Geneva Conventions be applied and that detainees be treated humanely at all times. (previously provided to the commission as an attachment to D-008) All known interrogations of Mr. Jawad occurred prior to this date.

u. Although the United States recognized that juveniles were entitled to be held in separate facilities designed for the rehabilitation and reintegration of juveniles and that juveniles were entitled to special rights under the Optional Protocol on the Involvement of Children in Armed Conflict, Mohammad Jawad, unlike many other juvenile detainees at Guantanamo, was treated as an adult and was not afforded these rights. The U.S. recognized that Mohammad Jawad was a minor, but failed to treat him as a minor. No reason or authority for the failure to afford these protections has been provided to the defense.

v. Mr. Jawad was subjected to approximately 14 interrogations between February 2003 and January 2004 by the Joint Intelligence Group (JIG) inside the prison at Guantanamo. These interrogations are believed to have been conducted for the purpose of gathering intelligence. However, the focus of the interrogations frequently was Mr. Jawad's involvement in the grenade attack. No rights advisements of any kind were administered to Mr. Jawad during these interrogations. The Prosecution has indicated an intent to offer five reports from these interrogation sessions into evidence. Mr. Jawad never admitted throwing the hand grenade to any JIG Interrogator and repeatedly denied throwing the hand grenade. During these interrogations, a number of coercive interrogations methods were used.

w. Mr. Jawad was subjected to another 30 days of maximum segregation including physical and linguistic isolation from 17 September 2003 to 16 October 2003.

x. From 1 October 2003 to 20 September 2005, the Criminal Investigation Task Force (CITF) conducted approximately twenty interrogations of Mohammad Jawad specifically designed and intended to elicit incriminating statements in anticipation of a criminal case against him. Although the primary focus of the CITF was the development and preparation of criminal cases for trial by military tribunals (as opposed to intelligence gathering) Mr. Jawad was never provided any rights advisements by CITF interrogators. The prosecution has not indicated an intent to introduce any statements from these interrogation sessions, perhaps because Mr. Jawad never admitted throwing the hand grenade to any CITF interrogators and repeatedly denied throwing the hand grenade.

y. Reports from throughout 2003 indicate that Mohammad Jawad was suffering from severe homesickness and repeatedly asked for his mother. One interrogator was sufficiently concerned about his mental stability that he requested an assessment from the Behavioral Science Consultation Team. (BSCT)

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[7] See generally, Human Rights Watch, "Locked Up Alone: Detention Conditions and Mental Health at Guantanamo," June 2008 (Attachment 3)

z. The BSCT psychologist report, previously provided to the commission, [redacted] of Mr. Jawad.

aa. On 25 December 2003 Mr. Jawad attempted suicide.

bb. From 7 May 2004 to 20 May 2004 Mr. Jawad was subjected to the inhumane and abusive frequent flyer sleep deprivation program, during which he was moved from cell to cell 112 times in a fourteen day period. See D-08

cc. Mr. Jawad's height and weight records indicate that upon arrival he was 5'4" and 119 pounds upon arrival at Guantanamo on 6 Feb 2003 (See Defense Supp 3 to D-008). His most recent weight measurement was 156 pounds and he is approximately 5'8" or 5'9" by defense counsel's estimate. Mr. Jawad's weight records show a number of significant unexplained weight fluctuations, which may be indicators of stress. [8]

dd. Mr. Jawad's medical records contain numerous somatic and psychological complaints. [9]

ee. A Combatant Status Review Tribunal was held on 4 November 2004 According to the official report of the CSRT provided to the defense, Mohammad Jawad specifically denied throwing the hand grenade to the CSRT, and the CSRT expressed some doubt as to whether he had in fact thrown the grenade. However, according to the prosecution witness list, an interpreter present at the CSRT overheard Mr. Jawad admit to throwing the hand grenade. Although this witness was not identified as a potential witness for the suppression hearing, the prosecution has indicated their intent to call this witness at trial.

ff. Reports provided by the government indicate that Mr. Jawad completed school up to seventh grade. He speaks only Pashto, is competent at very little reading or writing, and is functionally illiterate.

gg. No records of any prior involvement with police or juvenile authorities in Afghanistan or Pakistan have been provided. Mf. Jawad's arrest by Afghan authorities is believed to have been his first direct contact with law enforcement officials.

6. **Statements Covered by this General Motion to Suppress:**

The government has indicated that they will introduce certain reports produced by U.S. interrogators and intelligence personnel into evidence, by an e-mail message dated 27 August 2008 (Attachment 4). [10] The defense has been provided with the reports, however defense

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[8] Expert medical evaluation is required to assess the relevance of these weight fluctuations.

[9] Preliminary assessment of the medical and psychological records of Mr. Jawad suggest the need for a more detailed evaluation by independent medical experts with experience evaluating and treating juvenile victims of torture and abuse.

[10] It is not known if this list was intended to be an exhaustive list. This motion should be considered a

counsel are unable to ascertain the name of a witness associated with the majority of the reports. Without being able to identify a witness or the interpreter associated with each report, it is impossible for the defense to identify the specific basis for suppressing each of these individual statements based on the "totality of the circumstances." Furthermore, because many of these statements are classified and/or because the defense had no way of determining the classification of the statements, the defense has been unable to discuss any of the specific interrogation sessions with Mohammad Jawad to learn more about the specific circumstances, to the extent that he might be able to remember any specifics.

Reports identified by the prosecution, and subject to this general suppression motion are listed below.

(1) IIR 6 034 0533 03 (Arrest Report) (SECRET / NOFORN) – unknown agency, unknown date of interview, author of report unknown, source of information unknown. FOB

(2) KB ISN 00900 (Knowledgeability Brief from Bagram Intake 17 Dec 2002) – unknown agency involvement, author of report unknown, relevance of report not clear.

(3) IIR 6 034 0550 03 (Interview of Jawad)(SECRET/NOFORN) – unknown agency, unknown date of interview, identity of interpreter unknown, author of report unidentified (FOB)

(4) IN T439-01-1218 (18 Dec 02) (Jawad Interview at Bagram) – unknown agency, identity of interrogator unknown, author of report unknown, identity of interpreter unknown

(5) IN T439-02-1219 (19 Dec 02) (Jawad Interview at Bagram) – unknown agency, identity of interrogator unknown, author of report unknown, identity of interpreter unknown

(6) IIR 6 044 6006 03 (20 Dec 02)(Incident Report)(SECRET) (Bagram)– unknown agency, unknown date of interview, identity of interpreter unknown, author or report unknown.

(7) IN T439-09-1228 (28 Dec 02) (Jawad Interview at Bagram) – unknown agency, identity of interrogator unknown, identity of interpreter unknown, author of report unknown

(8) IN T439-10-0204 (4 Jan 03) (Jawad Interview at Bagram) – unknown agency, author of report unknown, identity of interrogator unknown, interpreter unknown.

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specific motion to suppress each of these statements and a general motion to suppress any other statements the government subsequently offers for which they have not provided notice.

(9) MFR 20030210 (Jawad Interview at GTMO) - unknown agency, author of report unknown, identity of interrogator (FRN 7-02629) unknown, interpreter unknown. (POC listed at 660-3291)

(10) SIR 20030211 (Summary of Incident/Initial interview Jawad at GTMO) – unknown author or report (POC is Team CA3, Interrogation Control Element, JTF GTMO), unknown identity of interpreter

(11) MFR 20030219 (Jawad Interview at GTMO) – unknown agency, author of report unknown, identity of interrogator (FRN 7-02697) unknown, interpreter unknown. (POC listed at 660-3291)

(12) SIR 20030409 (Summary of 9 Apr 03 Interview of Jawad at GTMO) – unknown author of report (POC is CA3, Interrogation Control Element, JTF GTMO)

(13) MFR 20030721 (Jawad Interview at GTMO) – unknown identify of author of the report (identifies only Team CA3, Interrogation Control Element, JTF GTMO), unknown interpreter

(14) SIR 20030903 (Summary of 3 Sept 03 Interview of Jawad at GTMO) – unknown author of report (POC is CA3, Interrogation Control Element, JTF GTMO)

The defense has requested more specific information about the statements the government intends to offer into evidence. In response, the government indicated to the defense and to the commission that they intend to introduce three statements allegedly made by Mr. Jawad. In an e-mail filing with the commission dated 13 Sept 08 (Attachment 5), the government stated that the following three statements would be offered:

(1) "I THREW THE GRENADE." or words to that effect.
(2) "I AM RESENTFUL OF AMERICANS IN AFGHANISTAN" or words to that effect.
(3) "I AM PROUD OF WHAT I DID AND WOULD DO IT AGAIN" or words to that effect.

No further information about these alleged statements was provided. The defense is unaware of the date of these statements and to whom the statement was made. Our review of the list of U.S. government produced reports derived from U.S. interrogations of Mr. Jawad identified by the government does not reveal any of the above quotations, or "words to that effect." It is impossible for the defense to formulate an intelligent motion to suppress these specific statements without more information about the facts and circumstances in which these statements were allegedly made.

The government witness list indicates an intent to introduce an oral statement allegedly overheard by [redacted] an interpreter, allegedly made by Mohammad Jawad at his CSRT on or about 4 November 2004. The defense attempted to contact this witness at the phone

number provided on the September 15 updated witness list, and the phone number was not accurate.

In D-019, filed 12 Sept 08, the defense sought permission to file a general suppression motion, explaining that "the defense has little or no information about the circumstances under which statements were obtained, who conducted the interviews, who interpreted the interviews, how long the interviews lasted, what questions were asked, and what the qualifications and motivations of the interpreters were." The following day, in the Prosecution Response to D-019 (Stevenson E-mail of 13 Sept) the government new lead trial counsel indicated that the prosecution had no idea what the defense needed to make a more specific suppression motion "It is unclear to the Government what additional information the defense needs to prepare any motions to suppress." Lead Trial Counsel LTC Stevenson is a very experienced prosecutor and defense counsel who has filed and or responded to numerous motions to suppress statements throughout his military career. Assistant Trial Counsels are also experienced criminal litigators with extensive experience and familiarity with suppression motions. Their feigned ignorance of the information required to file a suppression motion is completely disingenuous, and further evidence of their intentional failure to provide relevant discovery to the defense.

7. **Law and Argument:**

It is impossible for the defense to competently represent Mr. Jawad regarding the suppression of the above listed statements without knowing the witnesses associated with each statement on the conditions under which each statement was made. Also, the defense is precluded from providing Mr. Jawad competent representation without the assistance of the requested expert consultants – [redacted] The following law and argument is provided a general guide as to the issues that the defense believes may be relevant to a motion to suppress the above three statements.

I. Unwarned statements are subject to automatic exclusion.

a. The warnings required by *Miranda* are designed to ensure that an individual subjected to custodial interrogation is made fully aware of his Fifth Amendment privilege against self-incrimination and to ensure that if the individual chooses to speak without an attorney, his waiver of that right is made knowingly, intelligently and voluntarily. The government bears a "heavy burden" when it attempts to demonstrate such a waiver. *Miranda v. Arizona*, 384 U.S. at 475; *accord Tague v. Louisiana*, 444 U.S. 469 (1980).

b. The warnings established in *Miranda* are well established in the U.S. legal system and have "become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States,* 530 U.S. 428, 443 (2000). There is no need to rehash these principles here. The important question is whether these principles apply when U.S. agents conduct custodial interrogations abroad. The answer is clearly that they do apply. Mr. Jawad should have been given Miranda warnings, or an appropriately tailored rights advisement, when questioned by U.S. interrogators at FOB 195, Bagram, and Guantanamo in order for those statements to be used against him in a court of the United States.

c. In the Embassy Bombings case, Judge Leonard B. Sand of the Southern District of New York held that *Miranda* applies when U.S. Agents question a detainee outside the United States. In *United States v. Bin Laden* the defendant, Mohamed al-Owahli, was apprehended and detained by Kenyan authorities in Kenya after the bombing of the U.S. embassy in Nairobi. *See* 132 F.Supp 2d 168, 173-70 (S.D.N.Y. 2001). U.S. law enforcement personnel were permitted to question al-Owahli while he was in Kenyan custody. *Id.* Judge Sands held "insofar as he is the present subject of a domestic criminal proceeding, is indeed protected by the privileged against self-incrimination guaranteed by the Fifth Amendment." *Id.* Judge Sands criticized the rights advisement form used by the FBI and in order to accommodate the potential problems inherent in the provision of overseas counsel as well as *Miranda*'s plain injunction that the self-incrimination clause requires that a suspect in custody be plainly and unequivocally informed that he has a right to confer with appointed counsel prior to any questioning, *Bin Laden* proposed the following admonition, *inter alia*, be given:

> Because you are not in our custody and we are not in the United States, we cannot ensure that you will be permitted access to a lawyer, or have one appointed for you, before or during any questioning. However if you want a lawyer, *we will ask the foreign authorities to permit access to a lawyer or to appoint one for you. If the foreign authorities agree, then you can talk to that lawyer to get advice before we ask you any questions and you can have that lawyer with you during questioning.*
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> *Id.* (Emphasis added). [11]

d. Mr. Jawad was not given a Miranda warning or rights advisement in any form, nor was he offered the opportunity to consult with counsel. In order to conform to the requirement established in *Bin Laden*, the U.S. personnel merely had to coordinate with Afghan officials on the availability of a lawyer for Mr. Jawad.

e. The government may argue that this is a "battlefield" interrogation and therefore it was impracticable to provide a Miranda warning. They may also argue that the "public safety" exception applies in this case. Neither of these arguments is persuasive in this case. There was no immediate threat of harm to the public or to anyone else at the time of Mr. Jawad's first interrogation in U.S. custody at FOB 195. This was not a battlefield capture or interrogation. The Afghan police arrested and removed Mr. Jawad from the scene of the incident (a public bazaar in the peaceful capital city of Kabul) and interrogated him for several hours before he was turned over to U.S. custody at the request of the U.S.. The interrogation was not conducted with any sense of urgency and there was ample opportunity to provide Mr. Jawad with appropriate rights advisements.

f. The bar on the admission of statements obtained through compelled self-incrimination without appropriate warnings applies equally to interrogations for intelligence gathering. Miranda does not prevent U.S. agents from questioning suspects without giving

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[11] Judge Sands approach has been recognized as persuasive precedent and followed in several other cases. *See United States v. Abu Ali*, 395 F.Supp 2d 338 (E.D.Va 2005); *United States v. Karake*, 443 F. Supp. 2d 8, 49 (D.D.C. 2006).

warnings; interrogators gathering intelligence are free to question Mr. Jawad using any lawful interrogation technique available. Rather, Miranda simply precludes statements obtained without proper warnings from being used as evidence in a criminal trial; "it does not mean that such statements are never to be elicited in the first place." *Id.* at 189.

II. The statements obtained by U.S. agents on 18 December 02 at FOB 195 in violation of *Miranda* are not otherwise made admissible because the commission is located at Guantanamo Bay.

a. In the course of holding that the Suspension Clause applies in Guantanamo Bay, *Boumediene v. Bush*, ___ U.S. ___ (2008) (slip op.), the Supreme Court laid out the analytical framework for determining the extraterritorial applicability of other constitutional rights as well. The Court had long recognized that "even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id*, slip op. at 23 (*quoting Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). Distilling the relevant precedents from the Insular Cases through *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Reid v. Covert*, 354 U.S. 1 (1957), Justice Kennedy concluded for the majority that the extraterritorial effect of a particular constitutional provision turned on "objective factors and practical concerns, [and] not formalism." *Boumediene*, slip op. at 26.

b. The majority accordingly rejected the notions that extraterritoriality was strictly a function of the United States' territorial sovereignty or habeas petitioner's citizenship, and instead adopted Justice Harlan's focus on the practical obstacles to honoring the right: "the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" *Id.*, slip op. at 24 (*quoting Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring) (applying the "impracticable and anomalous" extraterritoriality test to the Fourth Amendment).

c. With regard to the Suspension Clause, the Court held that at least three factors were relevant to this practical determination:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ. *Boumediene*, slip op. at 28.

The commission should apply a similar analysis to rights derived from the Fifth Amendment to the Constitution, taking into consideration the following salient points:

d. First, neither *de jure* sovereignty over the location of the proceeding nor the citizenship of the defendant is dispositive of the constitutional question. Slip op. at 24 (citizenship), 26 (sovereignty).

e. Second, specifically with regard to Guantanamo Bay, the Supreme Court concluded in *Boumediene* that it was *de facto* within the territory of the United States. "In every

practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." Slip op. at 29. That conclusion was based on the pragmatic realities of the United States' control over Guantanamo and not on any special characteristic of the habeas corpus right. Accordingly, for purposes of the instant motions, the availability of the rights at issue should be determined no differently than if the commission proceedings were occurring on the United States' sovereign territory.[12]

f. Third, we discuss separately the possible "practical obstacles," such as they are, to vindicating Mr. Jawad's particular constitutional rights at issue in this case – his rights under the 5th Amendment. There is one overriding point about the practicality of recognizing these rights that is common to all, however. The *Boumediene* majority noted with regard to the Suspension Clause that "[h]abeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks." Despite the legitimacy of these concerns, it held that they were not dispositive: "The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." Slip op. at 29.

g. By contrast, recognition of Due Process and Fifth Amendment rights sought in the instant motions will not, for the most part, implicate these concerns at all. Unlike the Suspension Clause right, the constitutional rights that Mr. Jawad seeks to vindicate will not initiate new judicial proceedings in courtrooms far away from Guantanamo Bay, but will simply guarantee the fundamental fairness of the commission procedure that is *already* part of the "military mission at Guantanamo." *Id.* There are no "credible arguments" that Mr. Jawad's Due Process Clause and Fifth Amendment rights not to have coerced testimony used against him, will place any burden on the government other than the burden of providing guarantees of fair treatment in the procedures already initiated against him. Nor do the government's legitimate concerns for secrecy and national security permit the wholesale rejection of Mr. Jawad's fair trial rights. These concerns are dealt with every day in civilian and military courts in a manner that preserves both the government's interests and the defendant's constitutional rights. In light of these "'possible alternatives which Congress had before it,'" the government can show no "'practical necessity'" for denial of Mr. Jawad's fair trial rights. *Boumediene*, slip op. at 24 (*quoting Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

h. In sum, neither the government's decision to hold Mr. Jawad's trial at Guantanamo Bay nor any legitimate national security interests render "judicial enforcement of Mr. Jawad's constitutional rights . . .'impracticable and anomalous.'" *Id.* (*quoting Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)). What is entirely "anomalous" from the perspective of *Boumediene* and the earlier cases – and what is mandated by no legitimate "practical necessity" – is rather the government's previously stated view that Mr. Jawad has no constitutional protections at all in a judicial proceeding that is created by Congressional statute, that is held on *de facto* American territory, and that charges him with crime and seeks to deprive him of liberty.

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[12] To the extent that the government deliberately chose to hold [the defendant's] trial at Guantanamo in order to avoid the applicability of the Constitution, that is an independent basis for rejecting its position. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, slip op. at 27.

Even if *Miranda* and *Bin Ladin* are deemed not to apply to the extent that there is *per se* exclusion of unwarned statements, the United States is precluded from the introduction of involuntary statements obtained through coercion by the U.S. Constitution, Binding International Treaties, and The MCA Itself.

III. The Due Process Clause and the Fifth Amendment of the U.S. Constitution Precludes the Government's Use of Coerced Statements against Mr. Jawad

Physical and other forms of coercion including isolation and oppressive conditions of confinement are a basis to suppress Mr. Jawad's statements made during interrogations at FOB 195, Bagram and Guantanamo. *Spano v. New York*, 360 U.S. 315 (1959). If the government elects to introduce the statements of an accused, it bears the foundational burden of proving that the statements were the product of the accused's own free, uncoerced will. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). A statement need not be obtained by violence or the fear of violence to be excluded on due process grounds. "The blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn*, 361 U.S. at 206. Coercion is coercion regardless of whether the accused's will is subverted by physical, psychological or other improper methods. Indeed, the modern practice of in-custody interrogation is psychologically rather than physically oriented. *Miranda*, 384 U.S. at 448.

Because of the recognition that unconstitutional coercion presents itself in many guises other than mere physical violence, courts have frequently looked to conditions of confinement in assessing the voluntariness of statements given during or immediately after such confinement. *Brooks v. Florida*, 389 U.S. 413, 414-15(1967)(confession involuntary and in violation of Fifth Amendment where defendant housed in solitary for 14 days, "saw not one friendly face from outside the prison," and was "completely under the control and domination of his jailers." Court also considers the diminutive, barren cell in which defendant was held and his restricted and unhealthy diet to which he was subjected during this period); *Stidham v. Swenson*, 506 F.2d 478 (8th Cir. 1974)(in holding statement was involuntary, court relies heavily on fact that defendant had been held in solitary confinement in "subhuman conditions" for 18 months prior to giving statement. Dimensions and conditions of cell deemed important along with evidence that cell was infested with cockroaches and other rodents, lack of appropriate nutrition, and denial of visits with family or friends); *Arnett v. Lewis*, 870 F. Supp. 1514, 1523-25, 1540 (D. Arizona 1994)(in finding confession involuntary, among other factors Court notes that defendant had been incarcerated under "oppressive conditions," pointing out the Spartan and unsanitary condition of the jail, inadequate plumbing and hearing, lack of fresh, clean water, lack of adequate blankets, inadequate nutrition); *Townsend v. Henderson*, 405 F.2d 324, 326 (6th Cir. 1968)(in finding statement involuntary court notes defendant had been held in solitary confinement on an inadequate diet); *Wainwright v. LaSalle,* 414 F.2d 1235, 1237-39 (5th Cir. 1969)(among factors which Court notes in finding statement involuntary is that defendant was in "continuous incommunicado custody for about 12 hours" before confession was elicited for the first time and the ultimate confession followed previous denials).

As the above cases suggest, interrogation while the accused is held in solitary confinement, isolated from the rest of the world, including family, friends and counsel, are often dispositive considerations in the determination both of voluntariness of a statement for due process purposes as well as the adequacy of a waiver of the Fifth Amendment privilege against

self- incrimination. *See Miranda*, 384 U.S. at 476 ("Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights).

Many, if not all of the statements allegedly acquired from Mr. Jawad during custodial interrogations at Bagram and Guantanamo must be considered fruits of the poisonous tree of earlier coerced statements. Unfortunately, because of the lack of information about who interrogated Mr. Jawad at what time and what information they had at their disposal, it is impossible to identify what evidence is derivative of earlier illegal government activity.

e. The defense is unable to fully litigate the issue of the voluntariness of statements of Mr. Jawad because the defense has been denied the assistance of a clinical psychologist and a medical doctor. The defense believes there to be significant evidence that Mr. Jawad has been subjected to abusive conditions of confinement and has suffered many medical ailments that may have had an impact on the voluntariness of the statements. Without evaluations by the requested experts, the defense counsel can not make this assessment.

In the case of *U.S. v. Hamdan*, the commission found the testimony of a clinical psychiatrist relevant in evaluating the voluntariness of Mr. Hamdan's statements to interrogators. The relevant testimony also included the psychological and behavior effects of the conditions of confinement. These issues are more relevant in this case because Mr. Jawad was a juvenile at the time of many of the interrogations. Indeed, every statement the government has identified that they plan to offer into evidence, except the statement allegedly overheard at the CSRT was taken from Mr. Jawad while he was still a minor. No statements from interrogations from Mr. Jawad's last five years of captivity, when he might have been an adult, have been identified.

Several factors demonstrate that any statements made by Mr. Jawad while in U.S. were made under coercive conditions and should be suppressed. In order to more fully litigate the facts of this issue, the defense needs to be informed of the identity of witnesses to the statements and the conditions under which the statements were made. The reports provided to the defense list no potential witnesses – no interrogator, no interpreter. The defense has not been provided with any interview notes from any potential witness or interrogator. Additionally, in order to fully evaluate the impact of the environment on Mr. Jawad, the defense needs the expert assistance of a clinical psychologist and a forensic physician.

IV. Statements obtained involuntarily, through torture, or through coercion are inadmissible in military commissions pursuant to the MCA.

Under the Military Commission Rules of Evidence (M.C.R.E.) "A statement alleged to be the produce of coercion may only be admitted as provided in section (c)." M.C.R.E. 304(a)(2) Section (c) states:

> (1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative

value; and (B) the interests of justice would be served by admission of the statement into evidence.

The analysis required in Courts-Martial under the Military Rules of Evidence (M.R.E.) is instructive. Under the M.R.E., an involuntary statement is defined as a statement "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." M.R.E. 304(c)(3). A statement is voluntary only when it is "the product of an essentially free and unconstrained choice of its maker." *United States v. Martinez,* 38 M.J. 82, 86 (C.M.A. 1993), *citing Colombe v. Connecticut*, 367 U.S. 568, 602 (1961). In determining voluntariness, the court must consider the "totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Id. citing Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). This totality of the circumstances test "does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *Id.* at 87.

In *Hopt v. Utah,* 110 U.S. 574 (1884), the Supreme Court applied the common law rule prohibiting the use of unreliable confessions. As the Supreme Court indicated in its first case on the subject: "It is difficult, if not impossible, to formulate a rule that will comprehend all cases." *Hopt, 110 U.S. at 583.* As a result, the U.S. Supreme Court has applied a totality of the circumstances test in determining the voluntariness of a confession. *See, Haynes v. Washington,* 373 U.S. 503, 512 (1963). Applying this test, "the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics, 45 M.J. 93, 95 (1996).* Over the years, the Supreme Court and military courts martial have examined numerous circumstances, "including rights warnings, the length of the interrogation, the characteristics of the individual, including age and education, and the nature of the police conduct, including threats, physical abuse, and incommunicado detention." *United States v. Sojfer*, 47 M.J. 425 (1998). *See also United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967)*(confession inadmissible where appellant questioned throughout night, proceeded throughout following day, subjected to severe confinement conditions, threatened and interrogated again). Additionally, the Supreme Court has sought to protect individuals against offensive police practices. *Rogers v. Richmond,* 365 U.S. 534 (1961).

The M.C.R.E. clearly imports the principles of the *Fifth Amendment* to the U.S. Constitution to proceedings before this commission. *See* Mil. Comm. R. Evid. 304. The coercive nature of the interrogation and the individual characteristics of Mr. Jawad including his age and education, total lack of familiarity with the criminal justice system, are all circumstances which militate in favor of suppression.

A. Under the totality of the circumstances, the statements allegedly obtained by the U.S. from Mohammad Jawad were obtained by coercion, are involuntary and are unreliable.

(1) The totality of the circumstances surrounding the interrogation at the FOB render the statement inadmissible.

a. Mr. Jawad was delivered to U.S. personnel after over 6.5 hours of interrogation by high level Afghan officials and police. There was no parent or other adult present to support Mr. Jawad, a juvenile, during any interrogations. He was blindfolded and transported to FOB 195. Upon reporting to FOB 195 at 2000 to 2100, he was immediately stripped naked. He was naked throughout a medical examination. Throughout the exam he was held at his wrists by two American military members. Several people were in the room during the exam and there was no interpreter. Mr. Jawad was forced to provide a urine sample in the room in front of this audience and forced to pose for nude photographs and possibly videotaped while nude. Mr. Jawad was observed to have goose bumps and appeared fearful during the examination. Immediately following this degrading, humiliating and intimidating examination, Mr. Jawad was taken to the interrogation room where he was interrogated by multiple interrogators with multiple interpreters being utilized and several other uniformed military observers in the room nearby. (The government witness list identifies at least five people alleged to have been present during the interrogation.) The interrogation was videotaped. Mr. Jawad had just been handed over an exhausting and frightening interrogation by Afghan police and security officials to the armed military force of an enemy nation who were accusing him of intentionally seeking to assassinate two of their fellow unit members. The U.S. forces had been incorrectly informed that Mr. Jawad was the sole suspect in the attack and had confessed to being solely responsible for the attack, so the interrogators were quite confident that he was guilty and refused to accept his initial denials of being the grenade thrower. This was Mr. Jawad's first significant contact with Westerners, or non-Muslims. He had been indoctrinated to believe that Americans were infidels and enemies of Islam, and been exposed to misleading propaganda about America and the American military. He was undoubtedly afraid for his life. He was in obvious fatigue, yet the interrogation lasted well into the night. Mr. Jawad was not provided with water or food before or during the first several hours of the interrogation. (He was eventually given an MRE, an unfamiliar food.) Mr. Jawad's Human Rights observer did not talk to him and only watched to make sure Mr. Jawad was not physically harmed.

b. The exact impact of these known coercive factors is difficult to determine without the assistance of a clinical psychologist. Defense counsel have requested the videotapes of the interrogation, but they have not been provided. The identity of the interrogators and other observers involved in the interrogation were only very recently provided to the defense and the defense. The identify of the interpreters who actually spoke to Mr. Jawad in his native language and can best explain his language, mood and behavior have still not been revealed to the defense.

c. The destruction or loss of exculpatory evidence requires suppression. The defense has a good faith belief that a video of the interrogation would show that under the totality of the circumstances, the statement derived from Mr. Jawad was coerced and unreliable.

d. One fact and circumstance to be considered in determining the reliability of a confession is whether the admission or confession is made again under less coercive or non-coercive circumstances. The most coercive circumstances were in Kabul and at Bagram and in the early days of detention at Gitmo when Jawad was the youngest and the conditions were the harshest. In at least 36 interrogation sessions at GTMO, he has never admitted to throwing the grenade. Another factor to consider concerning

reliability is that the confession allegedly made to the Afghan authorities and the confession allegedly made to U.S. interrogators just a few hours later are markedly different. Completely inconsistent confessions provided just hours apart under highly coercive conditions cannot be considered reliable.

(2) The totality of the circumstances known at this point surrounding the interrogations and general conditions of confinement at Bagram render all statements obtained there inadmissible.

a. Mr. Jawad was transported to the Bagram Control Point in the early morning hours of 18 December 2002. The identity of personnel and interrogators at Bagram have been concealed from the defense; however, investigation reports disclosed to the defense indicate Mr. Jawad was immediately placed in isolation and chained to the wall of his cell. He was subjected to multiple interrogations over a 49 day period. Following interrogation sessions, he was pushed down the stairs. Other physical and mental coercion included being forced into stress positions and being linguistically isolated. Mr. Jawad was intimidated by the sounds of screams from other prisoners and the rumors of other prisoners being beaten to death.

b. The government has provided four documents to the defense relevant to interrogations at Bagram which they indicate will be used by the government. Not one of these reports references any of the statements the government has indicated an intent to use against Mr. Jawad - "I THREW THE GRENADE." or words to that effect, "I AM RESENTFUL OF AMERICANS IN AFGHANISTAN" or words to that effect, and "I AM PROUD OF WHAT I DID AND WOULD DO IT AGAIN" or words to that effect. Because the government has not disclosed the identity of the interrogator or interpreters involved in the interrogations, defense counsel can not seek additional information about the coercive nature of the interrogations or seek further clarification about what was said during each interrogation.

c. Some of the most coercive techniques employed by Interrogators at Bagram include using a [redacted] leading Mr. Jawad to believe that he would be released from confinement if he would cooperate. He was consistently reminded that "he could spend the rest of his life in prison if he did not provide as much information as he could . . . the more information he provided the easier it would be for the interrogators to convince their boss that he should be sent home instead of spending the rest of his life in prison." Things for Mr. Jawad got so desperate, that he eventually advised his interrogators that he was contemplating suicide. When Mr. Jawad expressed concern over the condition of the victims of the attack, he was told they "were still alive, although in very serious condition and were not expected to last much longer." This was clearly deceptive as the victims were known to be in stable condition at that time and not in danger of dying. Interrogator notes from the first interrogation at Bagram indicate that Mr. Jawad fell asleep during interviews because he was so tired and appeared to be suffering from drug withdrawals which caused him to fidget and not focus. Mr. Jawad was kept in an isolation cell which he found "depressing" and he was forced into discomfort when not allowed to use the bathroom when he needed. According to interrogators, Mr. Jawad had "no concept of it being day or night." Interrogators noticed that Mr. Jawad was fearful of several things – fear about his family's reaction to this incident, fear about being turned over to the Taliban (he told interrogators his cousin was tortured by the

Taliban), fear of HIG finding out that he was captured – these fears were all utilized by interrogators to coerce Mr. Jawad. Interrogators used Mr. Jawad's feelings of longing for his mother to gain his cooperation and noted in their repot that Mr. Jawad was "overwhelmed with excitement when he was given the opportunity to write a letter to his mother."

d. If custodial interrogations in American police custody are inherently coercive, then the interrogations of detainees at Bagram CP must be considered coercive. Domestic police interrogations are limited to 48 hours before an initial court appearance. Detainees at Bagram were held indefinitely in extremely harsh conditions and subjected to daily lengthy interrogations by armed enemy soldiers.

(3) The totality of the circumstances known at this point surrounding the interrogations and general conditions of confinement at Guantanamo render all statements obtained there inadmissible.

a. Mr. Jawad, a juvenile at the time of his arrival to Guantanamo, was immediately subjected to the coercive conditions of solitary confinement for 30 days – four interrogations were conducted during that period. He was subsequently subjected to solitary confinement a second time for another period of 30 days.

b. The coercive interrogation methods of Bagram continued to be implemented at Guantanamo. Interrogators utilized Mr. Jawad's fear of long term incarceration and his love and longing for his family and mother in order to induce cooperation. Mr. Jawad was led to believe that if he cooperated with interrogators he would be released from confinement. The interrogator told Mr. Jawad that "honesty and cooperation would be beneficial to the disposition of his case," leading Mr. Jawad to believe that if he was cooperative he would be released from confinement. During one interview, Mr. Jawad fainted just prior to the interview and was given an IV prior to the interview, he said he was dizzy and his stomach hurt, but the interrogation continued. Mr. Jawad frequently cried during interviews telling interrogators that he missed his mother.

c. If custodial police interrogations are inherently coercive, then the custodial interrogation of a detainee at Guantanamo, particularly in the early years, is much more so. Detainees were detained indefinitely without any rights, access to courts, access to counsel, constantly monitored by armed guards, constantly shackled, and subjected to bright lights 24 hours a day and other abusive conditions.

V. Binding U.S. Treaties Require the Suppression of Statements obtained Through Coercion

The Convention Against Torture precludes the introduction of statements obtained through both physical and psychological coercion and there is an enforceable right to suppress under this treaty, as the U.S. has acknowledged. In the official U.S. response to questions asked by the Committee Against Torture on May 5, 2006, U.S. State Department Legal Advisor John

Bellinger provided the following answer to the question of how Article 15 of the Convention13 was being applied to detainees at Guantanamo:

> Article 15 of the Convention is implemented in the Combatant Status Review Tribunal and Administrative Review Boards proceedings. Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards.[14]

This answer was provided prior to enactment of the MCA. However, Mr. Bellinger stated that he "would like to draw the Committee's attention to an important recent development with regard to the implementation of that article in military commission proceedings."[15] This answer provided by the State Department makes it clear that detainees at Guantanamo do have enforceable rights under the CAT in all legal proceedings as Guantanamo, including commissions.

The Geneva Conventions require that prisoners of war be tried in regularly constituted courts. This has been interpreted to mean both that courts that try PWs must provide fundamental guarantees of justice recognized by all civilized people and that such courts must offer due process protections comparable to those afforded domestic criminal defendants. If Mr. Jawad were being tried in a regular American courtroom, there is no question that every one of his statements would be suppressed. The military commissions must apply the same standards of admissibility to which Mr. Jawad would receive if he were tried in U.S. Federal Court. Anything less would be an abrogation of our treaty obligations.

CONCLUSION

Each and every statement the prosecution intends to offer against Mohammad Jawad obtained while in US custody is an unreliable product of coercion and must be suppressed. This juvenile prisoner, delivered to an enemy Armed Force by his native country, and detained for the last six years as an enemy combatant, was never advised that he had any rights for one simple reason -- it was the U.S. government's position at the time that he had no rights – no right to counsel, no right to be advised of the basis for his detention, no right to challenge his detention. It has taken several years and several trips to the Supreme Court to establish that detainees do in fact have rights. In fact, Mohammad Jawad does have rights. He has the right to be tried by reliable admissible evidence. He has a right against compelled self-incrimination. He has a right to suppress unwarned coerced statements. Without these rights, it is impossible for Mr. Jawad to receive a fair trial and the military commissions cannot be considered regularly constituted courts. If these rights are enforced, the majority of the government's evidence must be suppressed.

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[13] Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

[14] United States Response to the Questions Asked by the Committee Against Torture, Q.42, May 5, 2006.

[15] Id.

The government's efforts to limit defense access to relevant discovery has hampered the defense's ability to provide enough evidence to fully evaluate the totality of the circumstances under which the pertinent statements were obtained. To the extent that the military commission is unpersuaded that suppression is warranted based on the evidence the defense is able to introduce at this time, the defense should be given additional time to supplement this motion and the hearing should be continued to allow the defense to further develop the record utilizing appropriate expert witnesses

7. Request for Oral Argument and an Evidentiary Hearing: The defense requests oral argument at the close of the evidentiary hearing on this motion.

8. Request for Witnesses: The defense is unable to identify the relevant witnesses at this time.

9. Conference with Opposing Counsel: The Defense has conferred with the Prosecution which opposes the relief sought.

10. Request for public release: The defense requests permission to publicly release the government response to this pleading and the court's ruling as soon as possible.

Respectfully Submitted,

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11. Attachments:

1. Photographs of Mr. Jawad (sent via SIPRNET)

2. Tim Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," New York Times, May 20, 2005.

3. Human Rights Watch, "Locked Up Alone: Detention Conditions and Mental Health at Guantanamo," June 2008

4. CDR Ellington, e-mail message dated 27 August 2008

5. LtCol Stevenson e-mail filing with the commission dated 13 September 2008

EXHIBIT J

UNITED STATES OF AMERICA v. Mohammed Jawad	**Defense Motion to Suppress Out-of-Court Statements by the Accused due to Coercive Interrogation** September 18, 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Judge's ruling on D-017 of 28 August 2008 establishing a deadline of 1200 hours on 18 September 2008 for filing of defense motions to suppress statements of the accused.

2. Overview and Relief Requested: Pursuant to the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, R.M.C. 905, 10 U.S.C. § 948r(c), Mil. Comm. R. Evid. 304(c)(1), Mil. Comm. R. Evid. 403, Afghan Constitution of 1964, Bonn Agreement (5 Dec 2001), Chapter V, United Nations Charter, Article 23, United Nations Resolution 1383 (2001), Security Council 4560th meeting (26 June 2002), Common Article 3 of the Geneva Convention, *Jus Cogens,*[1] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Protocol),[2] and persuasive case law the defense moves the commission to suppress any oral or written statements of Mohammad Jawad taken while in custody of the Afghan police on December 17, 2002, including the statement purportedly containing the thumbprint of Mohammad Jawad provided to the defense in discovery, as well as any additional evidence or statements derived from these statements. The written and oral

[1] A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another. BLACKS LAW DICTIONARY 864 (7th ed. 1999).
[2] GA Res. 54/263, U.N. Doc. A/RES/54/263, Annex (May 25, 2000) (entered into force Feb. 12, 2002); Treaty Doc. No. 106-37A, ratified with the advice and consent of the Senate in Executive Session, June 18, 2002, Cong. Rec. S5716-17.

statements attributed to Mohammad Jawad by the Afghan police were the products of coercion and are unreliable. The statements must be suppressed.

3. <u>Burden of Proof</u>: Because this motion challenges the admissibility of Mr. Jawad's statements on the basis that they were obtained by use of torture and coercion, the prosecution bears the burden of establishing the admissibility of these statements by a preponderance of the evidence. R.M.C. 304(e).

4. <u>Summary of Facts</u>:

a. On 17 December 2002 Mohammad Jawad was arrested in Kabul, Afghanistan by Afghan police and transported by Afghan police to the [redacted] Police Station in Kabul in connection with a hand grenade attack on a vehicle carrying two U.S. Special Forces Soldiers and their Afghan interpreter. The arrest occurred at approximately 1530 on 17 December 2002.

b. At the time of his arrest, Mr. Jawad was a minor under the age of 18. There is no indication that he had any prior experience with the criminal justice or juvenile justice system prior to 17 December 2002.

c. No evidence has been produced to indicate that Afghan police made any attempt to contact the parents, or guardian of Mr. Jawad, an individual they clearly identified as a juvenile, or any social service agency responsible for the well-being of juveniles. There is no indication that Mr. Jawad was given any sorts of rights advisement, such as the right to remain silent, or an explanation of the potential legal consequences of confession by Afghan authorities. There is no indication he was offered an opportunity to consult with counsel. There is no indication whether or not he was advised that he might be turned over to U.S. custody.

d. Afghan authorities observed Mr. Jawad to be under the influence or suffering from withdrawal of an unidentified psychotropic drug while he was in their custody.

e. After several hours of interrogation by Afghan police and numerous other high level Afghan authorities, including [redacted] and [redacted] During the time of the incident he was the [redacted] among others including unknown news reporters[3]

[3] U.S. soldiers, interpreter hurt in Kabul attack Tuesday, December 17, 2002 Posted: 12:25 PM EST (1725 GMT)

and [redacted] Afghan Military Force (AMF), Kabul, Afghanistan, [redacted] son of [redacted] (AMF) were also present during the interrogation of Mr. Jawad. Mr. Jawad was subjected to intimidating abusive and coercive treatment, both mentally and physically, while in the custody of the Afghan authorities, including being struck, threats to himself and threats to his family.

h. Wardak asserted that Mr. Jawad spoke English. This is inconsistent with the determination made with the observations made by the first American interrogator. He also indicated that according to the police who witnessed the attack, there was only one suspect involved. This directly conflicts with public statements made and reported by three separate U.S. news agencies.[4]

i. In interview of [redacted] was conducted during June of 2003. During this interview the [redacted] indicated that the interrogation lasted approximately 5 hours. He indicated that "during the first hour the suspect acted as if he were under the influence of some type of drugs." He observed that the suspect was "scared and concerned." He also noted that this was a "kid who was very vulnerable and was manipulated by a fanatic Muslim group." He believed that if the Afghan police could have continued their investigation they could have gotten more from the suspect. He also indicated that he believed the "kid" was lying about some of the information he was providing. [redacted] also indicated that there were "several interruptions during the interview as *everyone* wanted to take custody of this *prisoner*." He confirmed that Mr. Jawad was the person that they "arrested"

j. According to a summary of an interview of [redacted] Afghan Military Force, Kabul, Afghanistan he "saw a jeep moving down the road." He indicates that he "was 70-80 meters away from the jeep at that time." He states that he "observed the suspect getting ready to pull the pin on another grenade." At that time he "put a gun to the man's head and told him "Don't do it." Mr. Jawad was handcuffed at that time. No additional use of force was declared or observed to detain Mr. Jawad.

k. The following fresh injuries were identified by U.S. Forces during Mr. Jawad's in-processing: abrasion on wrist; abrasion on cheek; abrasion on nose. Photograph of injury to nose to be provided at hearing.

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http://edition.cnn.com/2002/WORLD/asiapcf/central/12/17/kabul.attack/index.html; U.S. Soldiers Injured In Grenade Assault KABUL, Afghanistan, Dec. 17, 2002 http://www.cbsnews.com/stories/2002/12/21/attack/main533991.shtml; Two U.S. Soldiers, Interpreter Wounded in Kabul Grenade Attack Tuesday, December 17, 2002 Associated Press http://www.foxnews.com/story/0,2933,73214,00.html; Perpetrators of Attack against U.S. Troops in Kabul arrested. Afghanistan Report 20 December 2002, Volume 1, Number 4, Amin Tarzi, http://www.globalsecurity.org/military/library/news/2002/12/4-201202.htm

[4] *Id.*

l. According to an interview of [redacted] Police Interrogator, [redacted] Kabul Afghanistan, he "calmed the suspect down." He notes that the "confession" was written for the suspect. He took the written confession and it was just he and the suspect **alone**. [redacted] asserts that the suspect spoke very good English as well. Acting on this erroneous information, American interrogators initially attempted to interrogate Mr. Jawad without the aid of an interpreter to no avail. In fact, it took the replacement of an interpreter to effectively communicate with Mr. Jawad given his dialect.

m. The written statement allegedly containing Mr. Jawad's thumbprint is written in Farsi. Mr. Jawad neither reads, writes, nor speaks Farsi.

n. After several hours of continuous interrogation by Afghan authorities, Mr. Jawad was transferred to U.S. custody at approximately 2200 on 17 December 2002. Upon being turned over to U.S. custody, Mr. Jawad was taken to Forward Operating Base (FOB) 195, the Kabul Military Training Center (KMTC), for further interrogation and remained there overnight. According to U.S. medical documentation Mr. Jawad was not offered anything to eat or drink while detained by Afghan authorities. The U.S. interrogator that continued the interrogation of Mr. Jawad after he was turned over to U.S. custody noted that he was very tired and hungry and was visibly afraid.

o. No evidence was provided as to who directed U.S. Forces to take custody of Mr. Jawad from the Afghan Authorities or on what basis. In fact, evidence suggests Afghan authorities were prematurely forced to hand over Mr. Jawad and would have preferred to maintain custody of Mr. Jawad longer than they were allowed.

p. U.S. Forces personnel also observed Mr. Jawad to be suffering from drug withdrawal upon his arrival to the FOB.

5. **Law and Argument:**

Introduction: Statements which are obtained through coercion are not admissible in military commissions unless the military judge finds the "totality of circumstances render the statement reliable and possessing sufficient probative value"; and "the interests of justice would best be served by admission of the statement into evidence." MCRE 304(c)(1). This standard cannot be met by the prosecution. The written and oral statements attributed to Mr. Jawad while he was in the custody of the Afghan police are extremely unreliable because of the highly coercive circumstances in which they were taken. Furthermore, principles of Afghan, international and U.S. law all militate in favor of suppression of the statements.

A. THE STATEMENT UPON WHICH MR. JAWAD, A NATIVE AFGHAN JUVENILE ON 17 DECEMBER 2002, IN WHICH HE ALLEGEDLY PLACED HIS FINGERPRINT, DRAFTED BY AN AFGHAN GOVERNMENT OFFICIAL IN A LANGUAGE NOT ACCESSIBLE TO THE ACCUSED WAS COERCED, IS UNRELIABLE, AND ADMISSION OF THE STATEMENT WOULD BE CONTRARY TO THE INTERESTS OF JUSTICE.

1. Statement was obtained in violation of Mr. Jawad's Afghan Constitutional (1964) rights in effect on 17 December 2002.

On 5 December 2001 the "Bonn Agreement" was signed which provided guidance regarding the interim Afghan governmental structure.[5] Specifically, the agreement provided under the "Interim Authority" provisions, subsection II titled "legal framework and judicial system," that the Afghan Constitution of 1964 would be applicable until the new Constitution is drafted and ratified. This agreement was then referenced, incorporated, and adopted in United Nations Resolution 1383 (2001) unanimously by the Security Council. The United States, per Chapter V, United Nations Charter, Article 23 is a permanent voting member of the Security Council. The Bonn Agreement was reaffirmed by the Security Council during the 4560th Meeting conducted on 26 June 2002 which addressed, inter alia, the successful conduct of an emergency Loya Jirga[6] by the transitional authority of Afghanistan.

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[5] http://www.afghangovernment.com/AfghanAgreementBonn.htm

[6] http://news.bbc.co.uk/1/low/world/south_asia/1782079.stm Monday, 1 July, 2002, 21:22 GMT 22:22 UK [Hundreds of Afghans - political and tribal leaders and other representatives from across Afghan society - took part in a loya jirga, or grand council, in June which chose the new transitional government for the country. What is a loya jirga? It is a forum unique to Afghanistan in which, traditionally, tribal elders - Pashtuns, Tajiks, Hazaras and Uzbeks - have come together to settle affairs of the nation or rally behind a cause. The phrase loya jirga is Pashto and means "grand council". The institution, which is centuries old, is a similar idea to the Islamic "shura", or consultative assembly. Historically it has been used to settle inter-tribal disputes, discuss social reforms and approve a new constitution. Hundreds of men wearing turbans, Persian lamb hats or embroidered quilt coats would pack into a vast hall. Long debates would take place in Pashto and Dari, with the inclusion of the occasional Koranic quote in Arabic. Who are the delegates and how were they chosen? About 1,500 delegates from all over Afghanistan took part in the loya jirga in Kabul. More than 1,000 were elected in a two-stage process. Each district elected 20 people, who then held a secret vote to select one person to represent the whole district. Each of the country's 362 districts had at least

Accordingly, the Afghan Constitution of 1964 was in effect at the time of the alleged incident on 17 December 2002. Title Three of the Afghan Constitution of 1964, "Basic Rights and Duties of the People" Article 26, states the following:

> Liberty is the natural right of the human being. This right has no limitations except the liberty of others and public interest as defined by the law. The liberty and dignity of the human being are inviolable and inalienable. **The state has the duty to respect and protect the liberty and dignity of the individual.** No deed is considered a crime except by virtue of a law in force before its commission. No one may be punished except by the order of a competent court rendered after an open trial held in the presence of the accused. No one may be punished except under the provisions of a law that has come into effect before the commission of the offense with which the accused is charged. No one may be pursued or arrested except in accordance with the provisions of the law. No one may be detained except on order of a competent court, in accordance with the provisions of law. **Innocence is the original state; the accused is considered innocent unless found guilty by a final judgment of a court of law.** Crime is a personal deed. Pursuit, arrest, or detention of the accused and the execution of sentence against him does not affect any other person. Torturing a human being is not permissible. No one can torture or issues orders to torture a person even for the sake of discovering facts, even if the person involved is under pursuit, arrest, or detention, or is condemned to a sentence. Imposing punishment incompatible with human dignity is not permissible. **A statement obtained from an accused or any other person by compulsion is not valid.** Confession of a crime means the admission made by the accused **willingly and in full possession of his senses** before a competent court with regard to the commission of a crime legally attributed to him. **Every person has the right to appoint defense counsel for the removal of a charge legally attributed to him.**

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one seat, with further seats allotted for every 22,000 people. No group was excluded from the assembly, but anyone alleged to have committed acts of terrorism or suspected of involvement in drugs, human rights abuses, war crimes, plunder or theft of public property is barred from attending. Of the remainder of the seats, a total of 160 were given to women. Nomads, refugees, academics, cultural institutions, social organizations and religious scholars were also represented. The Taleban movement were not represented, but groups who share their political, social and cultural views sent representatives. A loya jirga is seen as an essential process - one that is wholly Afghan. It is also seen as an inclusive institution. Women will attend for the first time. It is an institution favored by the Pashtuns in the south of the country, who believe they lost out during the Bonn political talks at the end of last year.]

Article 26 of the Afghan Constitution provides protection from compelled self-incrimination similar to that found in the Fifth Amendment to the U.S. Constitution. The Afghan Constitution also provides a right to counsel. These two rights, coupled with the inherently coercive environment of police custodial interrogation, form the basis for the requirement that American criminal suspects be provided a rights advisement, commonly known as a Miranda warning. Mr. Jawad was clearly subjected to a custodial interrogation. He was arrested as a suspect in a serious offense, and taken to the police station in a police car. The interrogation, even assuming an absence of any physical violence or threats was inherently and highly coercive. No counsel was provided or offered during this interrogation. Mr. Jawad was not informed of his rights to counsel or his right to remain silent.

Despite the lofty rhetoric of the Afghan Constitution, the rights of criminal suspects in Afghanistan are honored more in the breach than in the observance. Mohammad Jawad would have been well aware, as any citizen of the region would, of the reputation of the Afghan police for corruption and brutality. Indeed, Afghan police are notorious for their endemic disregard of human rights and pervasive corruption. These behaviors are well documented by journalists, NGOs and government agencies.[7]

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[7] See, e.g. CNN video "Grenade Attack" 17 December 2002. *Reforming Afghanistan's Police* Asia Report 138, 30 August 2007 (www.crisisgroup.org/home/index.cfm?id=5052&l=1); *Afghan Police Sentenced for Sex Abuse of Boy, Father* The Associated Press Published: February 23, 2008 (http://www.iht.com/articles/ap/2008/02/23/asia/AS-GEN-Afghan-Sex-Abuse.php); *Afghan Politician Rejects Prison Abuse Claims* Updated Tue. May. 1 2007 8:02 AM ET CTV.ca News Staff (http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070430/afghan_detainees_070430/20070430?hub=TopStories); *Afghan Beat Students;* New York, November 14, 2002 (http://www.hrw.org/press/2002/11/afghan1114.htm); *Arms Further Abuse* AI Public Briefing -- AI Index: ASA 11/004/2008 3 April 2008 (http://www.amnestyusa.org/document.php?lang=e&id=ENGASA110042008); David Rhode, *Overhaul of Afghan Police is New Priority,* N.Y. Times, Oct. 18, 2007, *available at* http://www.nytimes.com/2007/10/18/world/asia/18afghan.html?_1&oref=slogin. [Excerpts] American military officials are carrying out a sweeping $2.5 billion overhaul of Afghanistan's police force that will include retraining the country's entire 72,000-member force and embedding 2,350 American and European advisers in police stations across

Although statements obtained by Afghan police are inherently untrustworthy, there are a number of specific reasons to be particularly skeptical of the reliability of statements obtained by Mr. Jawad.

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the country. The new effort is a vast expansion of the current American program and is the third significant attempt to bolster the country's feeble police force since the American-led invasion in 2001. Improving the police force is a key to defeating the Taliban and salvaging the credibility of the central government, which is widely viewed as corrupt, according to Western officials. Maj. Gen. Robert W. Cone took over the Afghan effort in July after revamping the training of American troops bound for Iraq and Afghanistan. "I want in every district in this country the same kind of full-court press," the general said in a recent interview in Kabul. "I want to break the corruption." **Some current and former American and Afghan officials warn that corruption, drug trafficking and rising lawlessness pose graver threats to the government than even the Taliban.** Without a serious Afghan-led drive to end the corruption, they say, any effort to improve the police force may well fail — and many hundreds of millions of dollars will have been wasted. But that is something President Hamid Karzai has so far largely failed to carry out. One example they point to is Mr. Karzai's January appointment of Izatullah Wasifi, an Afghan-American convicted of selling heroin in Las Vegas 20 years ago, as the head of the government's new anticorruption body. In news interviews Mr. Wasifi, whose father supported Mr. Karzai against the Taliban, has called the conviction a youthful mistake. Also, a widespread public perception exists that Mr. Karzai's brother, Ahmed Wali Karzai, is involved in drug trafficking. So much so that Western officials say they have long urged Mr. Karzai to have his brother leave the country, though they acknowledge that there is no definitive proof of wrongdoing. **Rooting out the corruption in the force is a gargantuan task. After leaving police training to Germany for the first two years after the fall of the Taliban, the United States has steadily increased what it spends on the task.** In 2005, the military took over from the State Department and spent more than $2 billion on equipment and increased pay for the police. Now, entire police units will be pulled out of districts, trained as a group for eight weeks and then sent back in a top-to-bottom effort to eliminate corruption. **Police corruption has contributed to Afghanistan's becoming the world's largest producer of opium, according to United Nations officials.** Last year, after another bumper crop, it produced 93 percent of the world's supply. The international effort to train a new police force, meanwhile, has been beset by infighting, inconsistency and a slow pace. For the first two and a half years after the fall of the Taliban, no systematic police-training program existed outside of the capital, Kabul, according to American and Afghan officials.....**Evidence of high-level corruption, though, was commonplace. During a meeting between the top American and Afghan security officials in southeastern Afghanistan last month, American officials said a survey had found only 1,200 officers at work in an area where Afghan commanders claimed 3,300 officers were serving**. Collecting the salaries of nonexistent **"ghost officers"** has been a long-running practice of senior Afghan police commanders. General Cone said progress was being made. Long-awaited changes are already under way, including an increase in the pay of the Afghan police, the depositing of paychecks directly into officers' bank accounts and the reduction in the size of the force's bloated senior officer corps. **After months of wavering, Mr. Karzai named a new attorney general and allowed the removal of 11 of 14 senior police commanders that international officials said were involved in drug trafficking or corruption.** Ronald E. Neumann, the former United States ambassador to Afghanistan, said bold action, not more half-measures, was needed from both Afghan and Western officials. Decades of war and insecurity have warped the country's culture, he said. Unsure about the future, many Afghans believe they must look out for their families first and take what they can. **"You have a corruption of the entire culture of Afghanistan by 25 years of war,"** Mr. Neumann said. "It needs reform, but it has to be societal as well as juridical, and that takes time."

First, both Afghan officials as well as American forces indicate that it appeared as if Mr. Jawad was either on drugs or going through some sort of drug withdrawal. These observations confirm Mr. Jawad's repeated reports that he was forcibly drugged for several days prior to the attack and on the day of the attack. The Afghan police did not test Jawad for drug use and did not wait for the effects of the drugs to wear off before commencing a several hour interrogation. American medical personnel were sufficiently suspicious of drug use that they reportedly took a urine sample for toxicological analysis. Unfortunately, government recordkeeping was so poor that there is virtually no useful information about the urinalysis test, and it is unclear what drugs were tested for or the reliability of the methods used. It does not appear that the American Forces waited for the results of the test before commencing their own interrogation. If Mohammad Jawad was under the influence of drugs, as he has repeatedly reported, this would cast doubt on the voluntariness of any confession provided.

Mr. Jawad entered into his "relationship" with the Afghan officials literally with a "gun to his head" a harrowing and traumatic experience known to cause post-traumatic stress disorder. Mr. Jawad had been placed under arrest and was shackled. He was clearly viewed as a manipulated "kid" by an [redacted] He was outwardly distressed as observed by both the Afghanistan interrogator as well as the American interrogator later in the evening. During Mr. Jawad's in-processing he was observed to have fresh abrasions on his wrist, cheek, and nose. No observations, indications, or explanations are provided by the Afghan officials as to these injuries. No claim was made that U.S. Forces engaged in mistreatment while being transferred. Given the documented brutality of Afghan militia and police it is highly likely that Mr. Jawad sustained these injuries during his custodial interrogation. A review of CNN video taken at the

scene of the attack from that evening demonstrates that the Afghan police/ militia have no aversion to engaging in physical violence against civilians in an open and notorious way.

There is evidence provided by the government which indicates that Mr. Jawad was not provided food or water during his entire encounter with the Afghan officials. During the Afghan interrogation it is clear that a number of persons were present. At a minimu[redacted] was present. [redacted] plus several lower ranking Afghan police officers were also present during the interrogation of Mr. Jawad. The sheer number of adults present, as well as the exalted rank of these individuals, would have been overwhelmingly intimidating to a young tribal villager. It must also be noted that the majority of those present were from a rival ethnic and linguistic tribal group within Afghanistan, which would undoubtedly have contributed to Mr. Jawad's fear and intimidation.

Mr. Jawad was barely literate, if at all, in his native language of Pahsto, and not literate in Farsi, the language of the confession written for him by an Afghan policeman. Indeed, there is no evidence that any of the officials who interrogated Mr. Jawad spoke Pashto with any fluency. Surely, if there had been someone available who spoke Pashto, they would have employed that officer to help prepare Mr. Jawad's statement. The fact that the statement may bear Mr. Jawad's thumbprint is irrelevant, as Mr. Jawad had no idea what he was attesting to. A statement written in a language which the accused could not speak or read is per se unreliable and inadmissible in a court of law.

A statement made without a knowledge or understanding of the consequences of the statement cannot be considered voluntary or reliable. Whatever use Mr. Jawad may have

understood about the potential use of any statement he made, he could not have contemplated that the statement would be utilized by a foreign government some six years later for purposes of the first war crimes prosecution of a child soldier in history. Mr. Jawad was a poorly educated, unsophisticated minor, with no prior experience or exposure to the criminal justice system, under the influence of drugs potentially suffering from post traumatic distress being interrogated by one of the top officials of his country. It is clear from the Afghan police statements that no one really anticipated the fate of Mr. Jawad and the fact that he would be removed from his country indefinitely was not contemplated by any of the officers and was certainly not communicated to Mr. Jawad.

A careful review of the contents of the thumbprint statement suggests two possibilities. The first possibility is that the confession is true. If the statement is deemed to be reliable, and taken to be true, then the charges against Mr. Jawad must be dismissed. The statement asserts that Mr. Jawad acted on his own in travelling to Kabul, acquiring and throwing the hand grenade. If true, then Mr. Jawad cannot be considered an Alien Unlawful Enemy Combatant. An isolated violent act by a rebellious teenager is not a "violation of the law of war" and was not conducted by "forces associated with al Qaida or the Taliban." The Commission would lack both subject matter and personal jurisdiction.

If the confession is false, then it is obviously unreliable and must be suppressed. There are several factual assertions in the statement that are demonstrably false. The following information is demonstrably erroneous in the transcribed statement, including Mr. Jawad's name, father's name, grandfather's name, uncle's name, residence, current residence, his claimed lack of a brother, and his age, and his English speaking ability. The account also conflicts with the eyewitness accounts of the American victims. The account states that "I threw the bomb in the vehicle when they got

into the vehicle. The Americans injured in the attack state that they were driving along in the vehicle for some time when the attack occurred. The Afghan police concurred that the vehicle was moving down the street. The statement also indicates that the attack was directed at the British and "foreigners."

The prosecution believes the statement is both reliable and unreliable, both true and false. It is the prosecution's apparent theory that virtually everything in the statement should be disregarded as false, except the admission that he threw the hand grenade, which should be taken as true. The prosecution believes, contrary to the statement's claim of lack of political affiliation, that Mohammad Jawad swore his loyalty to the political party HIG, led by Hekmatyar Gulbuddin, and that Mohammad Jawad was trained by them and acting under their orders. The prosecution believes that Mohammad Jawad did not act alone, did not purchase the hand grenades and was intentionally targeting Americans, not the British. Of course, the prosecution is likely to argue that Mr. Jawad's statement was self-serving and that only those portions of the statement that are admissions should be considered reliable. But if Mr. Jawad were making a self-serving statement, why would he claim sole responsibility for a very serious attack? Wouldn't it make more sense for him to tell the police that he was recruited under false pretenses, drugged and coerced, and that he didn't intend to hurt anybody?

2. The Totality of the Circumstances Render the Statement Unreliable

The Military Commission Rule of Evidence (M.C.R.E.) 304 states, in pertinent part:

> When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.
>
> As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the

> circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

M.C.R.E. 304(c)(1).

Using a statement derived from hostile parties, from a minor who, without representation, in the absence of being informed of fundamental rights, written in a language not accessible to the accused by an antagonist, without the provision of food or water, under extraordinarily coercive circumstances, in contravention of Afghan Constitutional law given that American forces have had close to six long to illicit such information outside of these circumstances serves no governmental or legitimate purpose or requirement. If the public policy interests include the pursuit of justice through presentation of trustworthy evidence before the fact finder – this standard is met or served by incorporating statements of this nature.

American jurisprudence dictates that when a juvenile accused is implicated, the "totality of the circumstances" test takes on a special connotation as it is associated with any waiver of conferred rights.[8] The totality of the circumstances test requires the court to consider a number of factors including: 1) the presence of a concerned adult; 2) juvenile's age; 3) the juvenile's education; 4) the juvenile's knowledge of both his/her rights and 5) the substance of the charge against them; 6) whether the juvenile is held incommunicado; 7) whether the juvenile is allowed to consult with relatives, friends, or an attorney; 8) fair treatment by the police; 9) the juvenile's prior experience with the criminal justice system and police interrogation.[9] As of the end of 2001

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[8] Juvenile Waiver of Miranda Rights: Totality of the Circumstances Test, Linda Szymanski, Esq. January 2002, Vol 7., No. 1 NCJJ Snapshot, National Center for Juvenile Justice

[9] *Id.*

thirty nine U.S. jurisdictions used the totality of the circumstances test to decide whether or not a juvenile has validly waived his/her Miranda rights and privilege against self-incrimination.[10]

The analysis required in Courts-Martial under the Military Rules of Evidence (M.R.E.) is also instructive. Under the M.R.E., an involuntary statement is defined as a statement "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, **or <u>through the use of coercion</u>, <u>unlawful influence</u>, <u>or unlawful inducement</u>**." M.R.E. 304(c)(3) (emphasis added). A statement is voluntary only when it is "the product of an essentially free and unconstrained choice of its maker." *United States v. Martinez,* 38 M.J. 82, 86 (C.M.A. 1993), *citing Colombe v. Connecticut*, 367 U.S. 568, 602 (1961). In determining voluntariness, the court must consider the "**<u>totality of all the surrounding circumstances</u>** – both the characteristics of the accused and the details of the interrogation." *Id. citing Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). This totality of the circumstances test "does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *Id.* at 87.

The *Fifth Amendment* provides, "No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law...." The Manual for Courts-Martial echoes these principles and under Article 31(d), UCMJ, *10 USC § 831(d)*, prohibits, *inter alia*, the admission into evidence of any statement from an accused obtained "through the use of coercion, unlawful influence, or unlawful inducement..."

In *Hopt v. Utah,* 110 U.S. 574 (1884), the Supreme Court applied the common law rule prohibiting the use of unreliable confessions. As the Supreme Court indicated in its first case on the subject: "It is difficult, if not impossible, to formulate a rule that will comprehend all cases."

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[10] *Id.*

Hopt, 110 U.S. at 583. As a result, the U.S. Supreme Court has applied a totality of the circumstances test in determining the voluntariness of a confession. *See, Haynes v. Washington,* 373 U.S. 503, 512 (1963). Applying this test, "the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics, 45 M.J. 93, 95 (1996)*. Over the years, the Supreme Court and military courts martial have examined numerous circumstances, "including rights warnings, the length of the interrogation, the characteristics of the individual, including age and education, and the nature of the police conduct, including threats, physical abuse, and incommunicado detention." *United States v. Sojfer*, 47 M.J. 425 (1998). *See also United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967)*(confession inadmissible where appellant questioned throughout night, proceeded throughout following day, subjected to severe confinement conditions, threatened and interrogated again). Additionally, the Supreme Court has sought to protect individuals against offensive police practices. *Rogers v. Richmond,* 365 U.S. 534 (1961); *See also Spano v. New York* 360 U.S. 315 (1959).

The M.C.R.E. clearly imports the principles of the *Fifth Amendment* to the U.S. Constitution to proceedings before this commission. *See* Mil. Comm. R. Evid. 304. The coercive nature of the interrogation, individual characteristics of Mr. Jawad including his age and education, total lack of familiarity with the criminal justice system, threats, and specious nature of the statement scribed in a language not accessible to Mr. Jawad are emblematic of why this statement should be suppressed.

Applying the totality of the circumstances test within the legal framework as discussed *supra*, the following is offered:

a. The presence of a concerned adult

Eleven jurisdictions at the end of 2001 used the interested adult test.[11] NCJJ Feb 200 Vol. 7 No. 2. This test, while also a factor of the totality of the circumstances test, is a per se rule that will suppress a juvenile statement if it is determined that a concerned adult was available for consultation before or during the interrogation. *Id.* The rationale is that "parents or other adults are in a position to help juveniles in understanding their rights, acting intelligently in waiving them, and otherwise remaining levelheaded in the face of police interrogation." *Id.* In this case there appears to be no dispute of fact that this minor was subjected to coercive interrogation outside the presence or access to any concerned adult other than Afghan officials and American forces who were the victim of the attack.

b. Juvenile's age

> Juveniles' susceptibility to suggestion, coupled with their inherent naiveties and immature thought processes, raise considerable doubt as to their ability to understand and exercise their Fifth Amendment right against self-incrimination. Furthermore, they are extremely vulnerable to over implicating themselves in crimes or, even more unfortunate for all involved, confessing to crimes they did not even commit.[12]

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[11] Juvenile Waiver of Miranda Rights: Interested Adult Test, Linda Szymanski, Esq. January 2002, Vol 7., No. 2 NCJJ Snapshot, National Center for Juvenile Justice

[12] But I didn't do it: Protecting the Rights of Juveniles During Interrogation Lisa M. Krzewinski *22 B.C. Third World L.J. 355* Spring, 2002. *See also* Rethinking Juvenile Justice Elizabeth S. Scott Laurence Steinberg (Harvard University Press 2008) (Only in recent years has scientific interest focused intensely on the psychological transition between adolescence and adulthood, largely in response to new research showing continued brain maturation through the end of the adolescent period. Until this research began to appear in scientific journals and the popular press, the line between adolescence and adulthood was seen primarily as a legal or sociological boundary, rather than a psychological one.)

Mr. Jawad was a minor at the time of capture and his capacity to assert the rights conferred to him under the Afghanistan Constitution was simply absent. **Expert assistance is required to explore this issue further.**

c. The juvenile's education

Afghanistan's education infrastructure was essentially destroyed at the time of the U.S. led invasion in 2001.[13] Statistics were largely unreliable in 2001, however, estimates at that time placed the overall literacy rate at approximately 31.5 percent, with the female rate as low as 4.7 percent according to the United Nations Development Programme (UNDP). *Id.* In 1999 less than one-third of children were enrolled in schools and in 1990 the data indicated that of those children who were able to enter primary school, approximately 49 percent were able to reach grade 5. *Id.* An assessment of Afghanistan in September, 2007 found that the aggregate literacy rate was 28% with males hovering around an estimated 43%, a full three years after western intervention.[14] Complete access to Mr. Jawad's formal education records is impossible. An expert assessment was not conducted at the time of capture. It is believed that Mr. Jawad maintains some functional literacy with regard to reading Pashto. The statement of concern is written in Farsi. **Expert assistance is required to explore this issue further.**

d. Cognitive ability of Mr. Mohammad Jawad at time of alleged offense.

(1) Involuntary intoxication - At least persons, two Afghans and the first American interrogator indicated that Mr. Jawad was suffering from some an outward psychophysical manifestation which was viewed as "withdrawals." These observations are

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[13] http://www.watchlist.org/reports/files/afghanistan.report.php *See also* http://india_resource.tripod.com/census.html

[14] Afghanistan: Country Profile – Sep 2007 Office for the Coordination of Humanitarian Affairs – United Nations. ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1091970

consistent with Mr. Jawad's assertion of being drugged. It was of such concern that some sort of field urinalysis was performed by American forces over 6 hours after detention by the Afghan officials when he was still displaying "withdrawal-like" symptoms.

Expert assistance is required to provide a more definitive determination.

(2) Education level - As indicated *supra*, Mr. Jawad was a functional illiterate.

e. The juvenile's knowledge of both his/her rights – The record is absent of any information suggesting that Mr. Jawad had any prior contact with a criminal or juvenile justice system. Also, Jawad's self reported history is that he spent most of his youth in Pakistan, and therefore he was likely unfamiliar with the rights afforded to him under Afghan law or that he possessed some manner of criminal sophistication.

f. The juvenile's knowledge of the substance of the charge against them – While it was likely clear to Mr. Jawad that he was arrested in conjunction with the grenade attack, he had no concept of the consequences of the arrest. He appears to have been more concerned with his family finding out about his involvement with HIG then with any criminal consequences. It is believed that the Afghan police used deceptive tactics such as informing Mr. Jawad that he would be released if he confessed, and that he was a hero for wounding or killing the Americans, in an effort to persuade him to confess. Certainly, Mr. Jawad was not advised that he was going to be turned over to the Americans or that he faced extradition to the legal "black hole" of Guantanamo Bay. If Mr. Jawad was indeed considered a criminal at the time of detainment, he was certainly not informed that he would be facing an American tribunal for war crimes six years or and spending over one quarter of his life in a detainment facility located at Guantanamo Bay, Cuba with no adjudicative recourse.

Expert assistance is required to explore this issue further.

g. Whether the juvenile is held incommunicado – Mr. Jawad, a minor, was detained, held incommunicado and subjected to the rigors of Afghanistan interrogation as described above.

h. Whether the juvenile is allowed to consult with relatives, friends, or an attorney – Again, the record is absent of any evidence that this minor was afforded access to a concerned adult before or during the interrogation.

i. Fair treatment by the police

(1) Nature of interrogation

(a) Interrogation by high level authorities and the "victims" – Mr. Jawad was transferred to U.S. custody at approximately 2200 on 17 December 2002 after several hours of interrogation by Afghan police and numerous other high level Afghan authorities, including [redacted] During the time of the incident he was th[redacted] among others, were also present during the interrogation of Mr. Jawad.

(b) No food water / length of interrogation – Evidence provided by the government indicates that no sustenance was provided and the interrogation exceeded six hours and then he was given the Americans who, by that time, he was aware that they believed to have perpetrated the harm against.

(c) Threatened - This minor was repeatedly threatened throughout the interrogation and his injuries can reasonably attributed to his detain by the Afghan police.

(d) Pervasive corruption – As discussed above, it is well documented that corruption and brutal interrogation tactics were used by the Afghan police.

(e) Statement is drafted in language unfamiliar to Mr. Jawad

The alleged confession consists of two pages, written in Farsi. The confession was admittedly written by one of the Afghan policemen. [redacted] Mohammad Jawad was a functional illiterate who could barely read and could not write in his native language of Pashto. Mohammad Jawad did not speak or read Farsi at all.

(f) Illegal transfer of custody to U.S. Forces – there is no evidence or documentation that provides that the Afghan official were compliant with there own Constitutional mandates, policies, or procedures to include access to a interested adult and consideration for Mr. Jawad's state of being. In fact, the [redacted] indicated that he felt as if Mr. Jawad had been left in Afghan custody they could have gotten more information from him. [redacted] does not acknowledge that virtually everything in that statement was untrue except for the parts the government wants to proffer as reliable.

(g) Post traumatic stress –When the police captured him, they put a gun to his head. This would have very likely created extreme fear and anxiety, and could have cause PTSD. **Expert assistance is required to explore this issue further.**

(h) Psychophysical condition of Mr. Jawad – His condition was noted and disregarded as it related to the interrogation. **Expert assistance is required to explore this issue further.**

j. The juvenile's prior experience with the criminal justice system and police interrogation. – Again, the record is absent of any information suggesting that Mr. Jawad had any

prior contact with a juvenile justice system or that he possessed some manner of criminal sophistication. **Expert assistance is required to explore this issue further.**

CONCLUSION

The defense has informed the government repeatedly of our intent to move to suppress any confession or admissions made to Afghan authorities while in their custody on 17 December 2002. The defense has been hampered in describing the totality of the circumstances surrounding the taking of the statement by the failure of the government to provide accurate contact information for most of the witnesses involved. Based on the totality of the circumstances surrounding the statements known to the defense at this time, the overwhelming weight of the evidence suggests that the statements were obtained by coercion and must be considered unreliable. Surprisingly, at least based on the September 15, 2008 witness list, the government has apparently decided not to call at the suppression hearing any of the witnesses who allegedly heard Mr. Jawad's confession or who were involved in the preparation of the statement attributed to Mr. Jawad and might be able to shed some additional light on the facts and circumstances.

One can hardly imagine more coercive circumstances for the taking of a statement from a juvenile. Arrested at gunpoint, without any rights advisement or access to counsel, Mr. Jawad was interrogated for hours by the highest ranking law enforcement personnel in the land, then a statement was written for him in a foreign language. Unable to even sign his name, his thumbprint was placed on the last page of the statement. No American courtroom would admit a statement written in a language unspoken by the defendant under such highly coercive circumstances to be admitted. The Military Commissions are supposed to be a regularly constituted court guaranteeing a fair trial. The defense is skeptical of the ability for Mr. Jawad to receive a fair trial. Admission of this statement would prove conclusively that a fair trial is impossible.

7. Request for Oral Argument and an Evidentiary Hearing: The defense requests an evidentiary hearing at the next scheduled hearing date.

8. Request for Witnesses: The defense requests the government's and/or the commission's assistance in obtaining the following witnesses: N/A The Defense understands and will comply with its obligations to submit formal witness requests pursuant to R.M.C. 703.

9. Conference with Opposing Counsel: The Defense has conferred with the Prosecution which opposes the relief sought.

10. Request for public release: The defense requests permission to publicly release the government response to this pleading and the court's ruling as soon as possible.

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(202) 761-0133, ext. 106

By: KATHARINE DOXAKIS, LCDR, JAGC, USN
Assistant Detailed Defense Counsel

By: ERIC MONTALVO, Major, U.S. Marine Corps
Assistant Detailed Defense Counsel

EXHIBIT K

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
MOHAMMED JAWAD

2. ALIASES OF ACCUSED:
AMIR KHAN, MIR JAN, SAKHEB BADSHA

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0900

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

SEE CONTINUATION SHEET, ATTACHED.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
TREANOR, JOSEPH V.,	O-5	OMC-PROSECUTION
5d. SIGNATURE OF ACCUSER Joseph V. Treanor		**5e. DATE (YYYYMMDD)** 2007/10/09

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the _____ day of October, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

DARREL J. VANDEVELD
Typed Name of Officer

OMC-PROSECUTION
Organization of Officer

O-5
Grade

10 U.S.C. 1044(b)
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Darrel J. Vandeveld
Signature

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IV. NOTICE TO THE ACCUSED

6. On 8/10 OCTOBER, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

DARREL J. VANDEVELD
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

OMC-PROSECUTION
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 0815 hours, on 10 October 2007 at Arlington, Virginia

Location

For the Convening Authority: MARK J. MORGANTI
Typed Name of Officer

CW4
Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority 10 USC §948h Appointed on 6 Feb 2007	Arlington, VA	20080130

Referred for trial to the (non)capital military commission convened by military commission convening order 07-06 dated 13 November 2007

subject to the following instructions[1]: this case is referred non-capital

XX XX
Command, Order, or Direction

Susan J. Crawford
Typed Name and Grade of Officer

Convening Authority 10 USC §948h
Official Capacity of Officer Signing

Signature

VII. SERVICE OF CHARGES

9. On OCTOBER, 2007 I (caused to be) served a copy these charges on the above named accused.

DARREL J. VANDEVELD
Typed Name of Trial Counsel

0-5
Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

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Charge Sheet Continuation Page One in the Case of MOHAMMED JAWAD, ISN 0900

CHARGE I, Violation of 10 U.S.C. §§ 950t, 950v(b)(15), Attempted Murder in Violation of the Law of War.

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Michael Lyons, U.S. Army, with the intent to kill said Sergeant First Class Lyons.

Specification 2:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Christopher Martin, U.S. Army, with the intent to kill said Sergeant First Class Martin.

Specification 3:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Assadullah Khan Omerk, a citizen of Afghanistan, then accompanying and employed by U.S. Forces as an interpreter, with the intent to kill said Assadullah Khan Omerk.

Charge Sheet Continuation Page Two in the Case of MOHAMMED JAWAD, ISN 0900

CHARGE II: Violation of 10 U.S.C. §950v(b)(13), Intentionally Causing Serious Bodily Injury

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Michael Lyons, U.S. Army.

Specification 2:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Sergeant First Class Christopher Martin, U.S. Army.

Specification 3:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, Assadullah Khan Omerk, a citizen of Afghanistan, then accompanying and employed by U.S. Forces as an interpreter.

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